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LAI WOOI GIAP v. ROSLI ZAKARIA & ANOR

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
LAU BEE LAN JCA
S NANTHA BALAN JCA
B [CIVIL APPEAL NO: P-02(NCVC)(W)-830-05-2019]
5 FEBRUARY 2020

LAND LAW: *Transfer – Estate land – Estate land of deceased owner fraudulently transferred – Whether beneficiaries of estate land may file to set aside transfer*
C *without obtaining letters of administration – Whether absence of letters of administration obstruction to take legal steps to protect subject land – Whether special circumstances existed warranting filing of action to regain ownership of land – Whether transferee ceased to have indefeasible title under s. 340(2)(b) of National Land Code*

D

SUCCESSION: *Administration – Action for regaining ownership of land – Estate land of deceased owner fraudulently transferred – Whether beneficiaries of estate land may file to set aside transfer without obtaining letters of administration – Whether absence of letters of administration obstruction to take legal steps to protect subject land – Whether special circumstances existed warranting filing of action to regain*
E *ownership of land*

The respondents were the children of the late Zakaria Omar ('Zakaria') and the grandchildren of the late Oomar Mohamed ('Oomar'). The subject matter of the appeal was a parcel of land ('subject land'). The original co-owners of
F the subject land were Oomar, Arope Ahman, Oosope Mohamed and Sadeah Mohamed ('original owners'). Letters of administration ('LA') were not taken out in respect of the estates of Zakaria and Oomar. The original owners had purportedly given a power of attorney dated 16 November 2005 ('impugned PA') and the attorney named in the impugned PA was Mohd Saad Din ('Saad'). The impugned PA was purportedly executed by the
G donors in the presence of an advocate and solicitor, one Ahmad Rizal Hamid ('Rizal'). On 26 June 2006, the subject land was transferred to one Lai Wooi Giap ('appellant') ('impugned transfer') based on a transfer form executed by Saad. Upon becoming the registered owner of the subject land, the appellant applied for a vesting order dated 6 May 2015 to vest the legal title of the
H subject land in his name and for him to hold it as trustee for his daughter, a minor. The respondents filed the action in the High Court to obtain orders to declare the impugned PA as a falsified document and, therefore, null and void and that, in as much as the impugned transfer was predicated on the impugned PA, it be declared null and void and set aside and consequently
I for the ownership of the subject land to revert to the names of the original

owners. The respondents alleged that they, as the grandchildren of Oomar, had an interest in the subject land which formed part of the estate of Oomar and the sole ground on which the respondents sought to impugn the impugned PA was that Oomar had died in the 1930's or the 1940's. Thus, it was contended that Oomar could not have executed the impugned PA in the presence of Rizal on 16 November 2005. The High Court Judge ('HCJ') accepted the evidence of the respondents and found as a fact that the original owners had all passed away several decades ago and that the impugned PA was a falsified document. The HCJ allowed the respondents' claim and cancelled the appellant's name as the registered owner of the subject land. Hence, the appellant appealed. The broad issue that arose was whether the respondents, *qua* beneficiaries of a deceased co-owner of land, may without obtaining the LA, file legal action to set aside a fraudulent transfer of the land to the appellant and, consequently, for the ownership of the land to revert to the estate of the deceased. Thus, the primary question was – whether by reason of the absence of the LA, the respondents lacked the requisite *locus standi* to file the action in the High Court and whether the action was thereby incompetent and a nullity.

Held (dismissing appeal)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) The appellant was the immediate transferee of the subject land and in light of the finding by the HCJ that the subject land was fraudulently transferred to the appellant, he ceased to have an indefeasible title under s. 340(2)(b) of the National Land Code ('NLC'). Looking at the circumstances as a whole *a fortiori*, and in view of the HCJ's finding that this was a fraudulent land transfer or estate property, this of itself presented special circumstances warranting prompt action by beneficiaries to protect the estate from falling into the hands of other parties and thereby leaving the estate with no remedy to impugn the fraudulent transfer. Thus, special circumstances existed to warrant the filing of the action to regain ownership of the subject land. (paras 55, 68 & 75)

(2) Although it was established that the respondents had not applied for the LA, the respondents were not specifically challenged as to their lack of authority or capacity to sue because of the lack of the LA, or as to the lack of special circumstances warranting the filing of the action without the LA. The respondents had pleaded that they were the grandchildren and lawful beneficiaries of Oomar. That would entitle them to an equity in the estate of Oomar. Thus, the absence of the LA should not be an obstruction to the beneficiaries of the estate of Oomar to take legal steps to protect the subject land which had been proven (and which the

A appellant accepted) to have been fraudulently transferred to the appellant. Therefore, there were no merits and no appealable error in the findings of the HCJ to warrant any appellate intervention by this court. (paras 62, 70 & 76)

Case(s) referred to:

B *A Santamil Selvi Alau Malay @ Anna Malay & Ors v. Deepak Jaikishan [2015] 1 LNS 1221 CA* ***(refd)***

Al Rashidy Kassim & Ors v. Rosman Roslan [2007] 3 CLJ 361 FC ***(refd)***

Dato' Ramesh Rajaratnam v. Datin Zaleha Abd Rahman & Ors [2014] 5 CLJ 669 CA ***(refd)***

Deraman & Ors v. Mek Yam [1976] 1 LNS 20 FC ***(refd)***

C *Ingall v. Moran [1944] 1 KB 160* ***(refd)***

Lee Ngan Fong & Ors v. Gan Bo Tan & Ors [2011] 1 LNS 770 CA ***(dist)***

Omar Ali Mohd & Ors v. Syed Jajaralsadeq Abdulkadir Alhadad & Ors [1995] 3 SLR 388 ***(refd)***

Ooi Jim & Anor. v. Ai Eit & Ors [1974] 1 LNS 108 FC ***(refd)***

D *S Mariappan v. The Government Of Malaysia [1983] 2 CLJ 124; [1983] CLJ (Rep) 382 FC* ***(refd)***

Subramanyah AJ Karuppiah v. Bank Negara Malaysia [2011] 2 CLJ 178 CA ***(refd)***

Legislation referred to:

National Land Code, s. 340(2)(b)

E *For the appellant - Nashvinder Singh Gill & Gurdit Singh; M/s Sharif & Khoo*
For the respondents - Effendi Syah Noordin; M/s Effendi & Co

[Editor's note: Appeal from High Court, Georgetown; Civil Suit No: PA-21NCVC-20-11-2017 (affirmed).]

Reported by Suhainah Wahiduddin

F

JUDGMENT

S Nantha Balan JCA:

Introduction

G **[1]** This is an appeal against the decision of the High Court in Pulau Pinang dated 11 April 2019 ("the HC decision") wherein (after a full trial), the learned judge ("the judge") allowed the respondents' claim and cancelled the appellant's name as the registered owner of the subject land. The appellant was the first defendant in the High Court. There were four other H defendants in the High Court. However, they have not appealed against the HC decision. The grounds of judgment of the judge shall be referred to as "GOJ".

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[2] The broad issue that arises in this appeal is whether, the respondents, *qua* beneficiaries of a deceased co-owner of land may, without obtaining letters of administration ("LA"), file legal action to set aside fraudulent transfer of the land to the appellant and consequently, for the ownership of the land to revert to the estate of the deceased.

[3] Thus, the primary question is – whether by reason of the absence of LA, the respondents lacked the requisite *locus standi* to file the action in the High Court and whether the action is thereby incompetent and a nullity.

[4] The next issue is whether despite knowing that the respondents had not obtained LA and having failed to challenge the respondents' *locus standi* in the sense as contemplated by what has become known as the rule in *Ingall v. Moran* [1944] 1 KB 160 CA ("*Ingall v. Moran*") and the exception to the rule per the Federal Court case of *Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361; [2007] 4 MLJ 297; [2007] 3 AMR 341 FC ("*Al Rashidy*"), the issue as to lack of *locus standi* may nevertheless be raised on appeal.

The Facts

[5] The respondents are siblings. They are the children of the late En Zakaria bin Omar ("Zakaria"). He passed away on 17 June 1992. According to the respondents, Zakaria's father (their paternal grandfather) was the late Oomar bin Mohamed ("Oomar").

[6] In the High Court, the appellant disputed the fact that the respondents are the grandchildren of Oomar. Thus, the respondents had to prove to the satisfaction of the judge that they were indeed the grandchildren of Oomar. On this point, the High Court evaluated the evidence and made a finding of fact that the respondents are in fact the grandchildren of Oomar.

[7] Before us, the appellant has conceded that the respondents are the grandchildren of Oomar and does not take issue with the findings by the judge in this regard.

The Subject Land

[8] The subject matter of the appeal is a parcel of land held under GM 1035, Lot 591, Mukim 2, Daerah Seberang Perai Tengah, Pulau Pinang measuring 8043.1144 square meters in size ("the subject land"). The original co-owners of the subject land are Oomar, Arope bin Ahman, Oosope bin Mohamed (Oomar's siblings) and Sadeah binti Mohamed ('Oomar's sibling) (collectively, "the original owners").

[9] It is undisputed that LA was not taken out in the respect of the estates of Zakaria and Oomar.

A **Impugned Power Of Attorney**

[10] The original owners had purportedly given a power of attorney dated 16 November 2005 (registered in the High Court in Pulau Pinang *via* Registration No. 13937/2005) ("the impugned PA"). The attorney who was named in the impugned PA is one En Mohd Saad bin Din ("Saad"). Saad was
B named as the second defendant in the High Court.

[11] The impugned PA was purportedly executed by the donors in the presence of an advocate and solicitor, En Ahmad Rizal bin Abd Hamid ("Rizal"). Rizal was named as the third defendant in the suit.

C **Transfer Of The Subject Land**

[12] The subject land was transferred to Mr Lai Wooi Giap (the first defendant in the suit) ("the appellant") *via* Land Office No. Perserahan 0701SC2006002435 on 28 June 2006 ("the impugned transfer") which was based on a transfer form (Borang 14A). The Borang 14A, was executed by
D Saad as the attorney pursuant to the impugned PA.

[13] Upon becoming the registered owner of the subject land, the appellant applied for a vesting order dated 6 May 2015 to vest the legal title of the subject land in his name and for him to hold it as trustee for his daughter, Kelly Lai Kai Ying (a minor).
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The Suit

[14] The respondents filed the action in the High Court in Pulau Pinang on 30 November 2011 to obtain orders to declare the impugned PA as a falsified document and therefore null and void and that in as much as the impugned
F transfer was predicated on the impugned PA, that it be declared as null and void and set aside and consequently for the ownership of the subject land to revert to the names of the original owners.

[15] The respondents alleged that they, as the grandchildren of Oomar, have an interest in the subject land which forms part of the estate of Oomar
G and the sole ground on which the respondents sought to impugn the impugned PA was that Oomar had died in the 1930's or the 1940's.

[16] Thus, it was contended that Oomar could not have executed the impugned PA in the presence of Rizal on 16 November 2005. The PA is therefore a fake and falsified document.
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Findings By The Judge

[17] The judge accepted the evidence of the respondents and found as a fact that the original owners had all passed away several decades ago and at any rate, well before 2005. In this regard, the judge said:
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Pada saya, terdapat keterangan yang cukup jelas bahawa Surat Kuasa Wakil itu adalah dokumen palsu. Keterangan lisan PW2, PW3 dan PW4 membuktikan bahawa pemberi kuasa (donor) iaitu Arope bin Ahmad, Oomar bin Mohamed, Oosope bin Mohamed dan Sadeah (*sic*) binti Mohamed telah meninggal dunia berpuluh tahun lamanya sebelum tahun 2005. Mana mungkin orang yang telah mati boleh tandatangan dan cap jari Surat Kuasa Wakil dan memberi kuasa dan arahan kepada orang yang hidup (defendan kedua) untuk menjual hartanah tersebut.

Seterusnya, nombor-nombor kad pengenalan keempat-empat penama ini juga telah dibuktikan tidak wujud atau merujuk kepada orang lain. Maka, sekali lagi tidak wujud donor. Akhir sekali, defendan ketiga bersetuju bahawa Surat Kuasa Wakil itu adalah palsu kerana tandatangan beliau telah dipalsukan. Dengan keterangan yang ada, saya putuskan bahawa Surat Kuasa Wakil itu adalah dokumen palsu dan tidak sah.

[18] The judge ruled that the respondents are the grandchildren of Oomar. The judge also ruled that Oomar had passed away in the 1930's or 1940's and that the impugned PA is a falsified document. Consequently, the judge made the following orders:

1. Bahawa Surat Kuasa Wakil bertarikh 16.11.2005 yang didaftarkan di Mahkamah Tinggi Pulau Pinang No.13937/2005 adalah diisytiharkan sebagai palsu dan tidak sah.

2. Bahawa Pindahmilik Perserahan No. 0701SC2006002435 ke atas hartanah GM 1035, Lot No. 591, Mukim 2, Daerah Seberang Perai Tengah adalah diisytiharkan sebagai tidak sah memandangkan ia telah menggunakan rujukan Surat Kuasa Wakil 13937/2005 yang palsu untuk tujuan pendaftaran.

3. Defendan Keempat iaitu Pentadbir Tanah Daerah Seberang Perai Tengah hendaklah membatalkan Pendaftaran Pemegang Amanah No. 0701B2015001162 dan Pendaftaran Pindahmilik No. 0701SC2006002435 ke atas hartanah GM 1035, Lot No. 591, Mukim 2, Daerah Seberang Perai Tengah, Negeri Pulau Pinang dan hartanah ini dikembalikan di atas nama penama-penama asal sebelum Pendaftaran Perserahan No. 0701SC2006002435.

   DAN SELANJUTNYA DIHAKIMI bahawa Defendan Ketiga, Defendan Keempat dan Defendan Kelima hendaklah secara berasingan dan bersesama membayar kepada Plaintif-plaintif kos tindakan ini sebanyak RM10,000.00 sahaja.

The Appeal

[19] In this appeal, the critical issue is whether the respondents, who had not taken out LA in respect of the estate of the late Oomar, had the requisite *locus standi* to maintain the action in the High Court *vis-a-vis* the subject land.

[20] It was vigorously argued for the appellant that based on the salutary principle that was established by the English Court of Appeal in *Ingall v. Moran*, the suit was incompetent and a nullity and that the High Court decision in favour of the respondents cannot stand and should be set aside.

Memorandum Of Appeal

[21] At this juncture, it would be convenient to reproduce the relevant part of the memorandum of appeal ("MOA"), which identifies the appellant's complaint, which reads:

> 1. In allowing the Respondents' (Plaintiffs) claim in the action against, *inter alia*, the Appellant (1st Defendant), the learned Judge erred in fact and/or in law in holding that the Respondents had *locus standi* to bring the action.
>
> In so holding, the learned Judge did not give any adequate consideration to the following matters (or issues):
>
> 1.2 that the action was brought by the Respondents on behalf of the estate of Zakaria bin Omar ("Estate of Zakaria") and/ or the estate of Oomar bin Mohamed ("Estate of Oomar") without obtaining the mandatory Letters of Administration.
>
> 1.3 that the Respondents had failed to plead and/ or discharge the burden to establish the existence of special circumstances to enable them to bring the action without obtaining the Letters of Administration.
>
> 1.4 that since the death of the deceased, Zakaria bin Omar ("Zakaria"), in 1992 until the institution of the action in 2017 (after a lapse of 25 years) the Respondents were indolent and did not take any steps to obtain the Letters of Administration for the Estate of Zakaria. Neither did the Respondents provide reasonable or any explanation for such non-action.
>
> 1.5 that neither was there any allegation by the Respondents nor evidence to show that the subject property in dispute, ie, GM 1035, Lot No. 591, Mukim 2, Daerah Seberang Perai Tengah ("Lot 591") was at a real or urgent risk of being dissipated such that it warranted the Respondents to bring the action with haste without first obtaining the Letters of Administration.

The Argument

[22] In so far as the appellant is concerned, he contends that he purchased the subject land pursuant to a sale and purchase agreement dated 22 March 2006 and that the original owners were represented by Saad through the PA.

[23] The appellant has now abandoned all his complaints per the memorandum of appeal, save for the issue of *locus standi* (or rather the respondents' lack of it).

[24] In this regard, the appellant contends that the respondents did not apply or obtain LA or the *faraid* certificate which is applicable for distribution of property belonging to the estate of a deceased Muslim person. Thus, the respondents have no legal standing to initiate the action.

[25] It is of course to be noted that the issue of *faraid* is not mentioned in the memorandum of appeal and so it is to be disregarded altogether. At any rate the point was not argued before us. Lastly, the *faraid* certificate governs the issue of distribution of the estate of a deceased Muslim and of itself does not clothe a party with *locus standi* to sue.

[26] Back to the issue of LA, it was submitted for the appellant that only a personal representative can bring a claim on behalf of the estate of a deceased who died intestate and in order to be clothed with such legal capacity, LA must be obtained. And this must be done prior to commencement of legal action.

[27] Counsel for the appellant referred to a passage from the judgment in *Ingall v. Moran* where Goddard LJ said (p. 170):

> There is no doubt that where a deceased person leaves a will and therein names an executor the latter can institute actions before obtaining probate, though the actions may be stayed until the probate is granted: *Tarn v. Commercial Bank of Sydney*. The reason for this is, no doubt, that the executor's title is derived from the will which operates from the death of the testator, and the will which names him as executor is the last will of the deceased. He has a title to sue, but the court requires him to perfect his title and will not allow the action to proceed till this has been done. The action will be stayed, but not dismissed. An administrator is in a different position. An intestate's property, including choses in action, formerly vested on death in the ordinary, and now, by virtue of the Administration of Estates Act, which in this respect re-enacts earlier statutes, vests in the President of the Probate Division till he grants letters of administration to someone. The difference in the position of an executor and administrator in this respect was authoritatively stated by Lord Parker in delivering the advice of the Judicial Committee in *Chetty v. Chetty*. He said: "It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of actions, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the Rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot therefore, institute an action as administrator before he gets his grant. The law on the point is well settled.
>
> (emphasis added)

[28] Thus, it is contended that based on the rule in *Ingall v. Moran*, the action was a nullity and unsustainable as the respondents had not obtained LA.

[29] In amplification, counsel for the appellant emphasised that the capacity in which the respondents commenced the present action is not immediately apparent from the statement of claim ("SOC").

[30] This is because in paras. 22 and 23 of the SOC, the respondents complain that they and the beneficiaries of the original owners of the subject land have been made to suffer losses in that their names (as beneficiaries) cannot be registered as proprietors of the subject land.

[31] From this it would appear that the action is brought in connection with the respondents' alleged rights as beneficiaries. On the other hand, among the reliefs sought is an order that the subject land be returned to the original owners.

[32] This (according to the appellant) seems to show that the action is brought for the benefit of the estate of Oomar and/or estate of Zakaria's purported rights to the subject land.

[33] Counsel for the appellant referred to *Deraman & Ors v. Mek Yam* [1976] 1 LNS 20; [1977] 1 MLJ 52 where the Federal Court recognised the principle that a beneficiary may not commence an action on behalf of the estate without LA. In that case, the Federal Court said (p. 53):

> Furthermore, the appellants have no legal title. They never had. **They are only beneficiaries of their father's estate.** The only person who could have legal title after their father's death would be the legal representatives of the estate. There was no evidence of any legal representatives having been appointed. On that ground also the appellants have no right to bring an action under section 10(1)(a) of the Ordinance. The action ought to have been dismissed as the appellants have no right or cause of action. (emphasis added)

Al-Rashidy

[34] In *Al Rashidy*'s case, the Federal Court appears to have recognised an exception to the rule in *Ingall v. Moran* when it posited that where there are special circumstances, the beneficiaries of the estate of a deceased (who died intestate) may file legal action to preserve and protect the property of the estate which is at risk of failing into the hands of third parties.

[35] The essential facts of *Al Rashidy* are as follows:

(i) Hj Abu Bakar was the registered owner of a half undivided share of land in Rawang, Selangor.

(ii) The appellants were the grandchildren of the late Hj Abu Bakar, and were the lawful beneficiaries of his estate. The respondent had, by statutory declaration, claimed that the issue document of title of the said land had been lost from his custody.

(iii) Based on a power of attorney, which was purportedly signed by the said Hj Abu Bakar, the respondent had the half share in the said land transferred to himself.

(iv) The appellants challenged the validity of the transfer to the respondent. The appellant alleged that the transfer was obtained by the respondent through fraudulent means since Hj Abu Bakar had passed away in Indonesia in 1937.

(v) They brought the action seeking, *inter alia*, a declaration that the transfer of the land to the respondent was null and void and illegal on the grounds of fraud allegedly committed by the respondent. They also sought damages and costs.

(vi) The trial judge found that the title to the said land had been obtained by the respondent through fraud. He declared that the transfer of the land to the respondent was null and void and ordered the land to be transferred to the appellants.

(vii) The respondent appealed to the Court of Appeal. The Court of Appeal agreed with the finding of the High Court, that the respondent had obtained the title to the land through fraudulent means.

(viii) However the Court of Appeal felt constrained by the decision in *Deraman & Ors v. Mek Yam* (*supra*), to find that the appellants, *qua* beneficiaries, had no *locus standi* to bring this action without first obtaining a grant of LA in respect of the estate of Hj Abu Bakar.

(ix) The Court of Appeal ordered the land to be re-transferred to the respondent, but in the meantime ordered that a registrar's caveat be lodged against the land pending disposal of a fresh suit to be filed by the appellants. The appellants' appealed to the Federal Court.

[36] The question of law for which leave was granted by the Federal Court was as follows:

> Whether beneficiaries of a deceased person had *locus standi* to commence an action to regain and to protect land which had been fraudulently obtained by an outsider without first obtaining letters of administration?

[37] The question of law presupposed that the action was an estate claim and whether it could be made without the LA having first been obtained. In answering the question:

A (i) The Federal Court recognised that beneficiaries had no *locus standi* to bring a claim for the benefit of the beneficiaries without LA. Only the personal representative of the estate can do so.

(ii) The Federal Court recognised the existence of special circumstances which would allow a beneficiary to bring a claim on behalf of the estate
B without first obtaining LA.

[38] The Federal Court relied upon the case of *Ooi Jim & Anor. v. Ai Eit & Ors* [1974] 1 LNS 108; [1977] 2 MLJ 105 and the Singapore case of *Omar Ali Mohd & Ors. v. Syed Jajaralsadeq Abdulkadir Alhadad & Ors* [1995] 3 SLR
C 388 and allowed the appeal. On the facts of *Al Rashidy*, the Federal Court found the existence of special circumstances which enabled the action to be instituted without LA.

[39] In the *Al Rashidy*'s case, the special circumstances were that:

(i) the respondent had entered upon the subject land and damaged the fruit
D trees;

(ii) the respondent had demolished buildings found on the subject land; and

(iii) the subject land is liable to be sold by the respondent to a third party in which case the land may be lost forever.

E **[40]** It was accepted by the Federal Court that the appellants had to act fast in order to protect and preserve the estate of the deceased by bringing an action without having to first obtain LA.

[41] Thus, it was argued before us that each case turned on its facts and that
F in *Al Rashidy*, the Federal Court held that all the circumstances of the case must be considered to arrive at a just result. It was contended that the facts of *Al Rashidy* are distinguishable from the instant case.

[42] Before us, it was argued that there were no special circumstances and that the burden to demonstrate special circumstances was on the respondents.
G Counsel said that the threshold is high and hinges on the facts, circumstances and urgency of the matter (see *Dato' Ramesh Rajaratnam v. Datin Zaleha Abd Rahman & Ors* [2014] 5 CLJ 669; [2014] 6 MLJ 651 CA).

[43] The appellant argued that in the present case, the respondents had not even pleaded the existence of special circumstances much less established it.
H There was no allegation of a real and urgent threat or risk of dissipation of the subject land such that the respondents were compelled to initiate the action without securing LA, as is required in law. And, no explanation was afforded as to the need or urgency for the respondents to bring the action without first obtaining LA.

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[44] The respondents simply did not make out a case for special circumstances to enable them to fall within the exception. From this, it is clear that the respondents did not bring the action on account of purported existence of special circumstances.

[45] Counsel then referred to the Court of Appeal's decision in *A Santamil Selvi Alau Malay @ Anna Malay & Ors v. Deepak Jaikishan* [2015] 1 LNS 1221; [2016] 2 MLRA 87 CA which held as follows:

> In the first place, we agree with the learned judge's finding that at the time of the filing of the writ, the 1st plaintiff did not have the *locus standi* to act as the representative of the estate of the Balasubramaniam a/l Perumal (deceased) in the absence of letters of administration. We are satisfied that there is *nothing in the affidavit evidence to show that the filing of this action in the absence of the LA was necessary and expedient to protect and preserve the interest of the deceased's estate.* As such, we agree with the learned judge that there are no special circumstances warranting the court to invoke its discretion in the plaintiff's favour so as to exempt the plaintiffs from the strict rule as was done by the Federal Court in *Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 1 MLRA 307. (emphasis added)

[46] At any rate, it was argued before us that there was no real and urgent risk of the subject land being damaged or liable to be sold to a third party and this is to be gathered from the fact that since purchasing the subject land, the appellant has done nothing to damage or plunder it.

[47] The appellant purchased the subject land in 2006. In 2015, the appellant applied and obtained a vesting order to vest the legal title of the subject land in his daughter's name (a minor) with the appellant holding the property on trust for her. There has been no attempt by the appellant to sell the subject land to a third party.

[48] Counsel for the appellant stressed that the respondents had not brought or advanced the action on the basis of a purported existence of special circumstances. The pleadings of the respondents bear this out plainly.

[49] In the upshot, counsel said that the issue of *locus standi* should be approached as follows:

(i) If the respondents' action is a claim by beneficiaries (ie to assert beneficial interests in the subject land), then LA is required prior to initiating the action.

(ii) If the respondents' action is brought on behalf of the estate to protect and preserve the subject land for the estate, then special circumstances must be shown to be able to bring the action without LA.

[50] On account of there being no special circumstances, either way, they are bound by law to obtain LA before commencing the action. The respondents did not. As such, the respondents are not seized with the necessary legal standing to bring the action. This renders the action as incompetent and a nullity.

[51] Counsel for the appellant conceded that the point pertaining to lack of *locus standi* in the *Ingall v. Moran* sense was not raised in the High Court. However, he relied on the Court of Appeal's decision in *Lee Ngan Fong & Ors v. Gan Bo Tan & Ors* [2011] 1 LNS 770 CA and said that the lack of *locus standi* goes to jurisdiction.

[52] Thus, on that analysis it was argued that jurisdiction can be raised at any time. He said that if there was no jurisdiction, the failure to bring up the issue in the High Court is not fatal as there can be no waiver or consent to give jurisdiction when none existed in the first place.

Our Findings

[53] As stated earlier, the appellant has expressly abandoned all complaints raised in the MOA except for the issue of *locus standi* ie, the absence of LA to pursue an action for recovery of land belonging to the estate of Oomar. Hence, the appellant accepts the finding of the judge that the respondents are the grandchildren of Oomar and therefore lawful beneficiaries of his estate.

[54] Insofar as indefeasibility of title is concerned, the appellant also concedes that the impugned PA was a falsified document and that transfer of the subject land on 28 June 2006 was procured fraudulently by way of the impugned PA.

[55] The appellant is the immediate transferee of the subject land and in light of the finding by the judge that the subject land was fraudulently transferred to the appellant, he ceases to have an indefeasible title under s. 340(2)(b) of the National Land Code.

[56] The only issue to be determined in this appeal is whether the appellant is entitled to raise the issue of *locus standi* per the rule in *Ingall v. Moran* case and the exception to this rule as per Federal Court case of *Al Rashidy*.

[57] The present case is similar in the factual matrix to *Al Rashidy*'s case, ie, fraudulent transfer and the need for protection of estate property by way of legal action by beneficiaries, *albeit*, without obtaining LA.

[58] In this case the appellant raised the issue of *locus standi* in their defence but did not state specifically that the respondent lacked *locus standi* because of lack of LA or absence of special circumstances as posited in the *Al Rashidy*'s case. The relevant paragraph in the defence is para. [18] and it reads:

Secara alternatif dan selanjutnya, serta tanpa prejudis kepada Pembelaan Defendan Pertama diatas, ia adalah diplidkan bahawa Plaintif-Plaintif tidak mempunyai *locus standi*, kausa tindakan, tidak mempunyai dasar dan/atau tidak berhak untuk membuat tuntutan terhadap Defendan Pertama disini.

[59] In their reply, to defence the respondents maintained they have *locus standi*. In para. [12] of the reply, the respondents averred as follows:

Plaintif-plaintif merujuk para 18 pembelaan dan menafikannya. Sebagai waris-waris sah di dalam harta pusaka salah seorang pemilik asal hartanah berkenaan, Plaintif-plaintif memiliki locus standi untuk membuat tuntutan ini.

[60] Before the High Court the issue of *locus standi* in the *Ingall v. Moran* and *Al Rashidy* sense was not raised. The *locus standi* question before the High Court was in the context of whether the respondents was the grandchildren of Oomar and not in regard to the lack of LA. The issues that were before the judge can be gleaned from the GOJ which read:

1. Samaada plaintif-plaintif adalah waris dan cucu yang sah kepada Oomar bin Mohamed untuk menuntut relif-relif yang dipohon dalam tindakan ini.
2. Jika plaintif-plaintif mempunyai *locus standi*, samaada tuntutan plaintif-plaintif dihalang oleh had masa.
3. Samaada Surat Kuasa Wakil bertarikh 16.11.2005 adalah dokumen palsu dan tidak sah.
4. Samaada hakmilik defendan pertama boleh disangkal.
5. Samaada defendan keempat cuai bila meluluskan pindahmilik kepada defendan pertama.

[61] This neatly takes us to the topic of whether an appellate court will consider an issue which is being raised for the first time. Clearly, the present point was not expressly raised in the defence and neither was it framed as an issue for the judge to consider.

[62] It also appears from the notes of evidence that although it was established that the respondents had not applied for LA, the respondents were not specifically challenged as to their lack of authority or capacity to sue because of lack of LA, or as to the lack of special circumstances warranting the filing of the action without LA.

[63] No doubt, an appellate court has a discretion to consider an issue, *albeit* raised for the first time, if it is in the interest of justice to do so and provided it causes no prejudice or disadvantage to the other side and provided the issue does not require further evidence.

[64] The relevant principles to be considered and the narrow parameters for the (rare) occasion when a fresh issue will be entertained on appeal was examined by the Court of Appeal in *Subramanyah AJ Karuppiah v. Bank Negara Malaysia* [2011] 2 CLJ 178; [2011] 3 MLJ 454; [2009] MLJU 1644 CA where Justice Ramly Ali JCA (as he then was) said:

> [15] On this issue, it is trite that as a general rule, the appellate court does not allow a new point which was not raised in the court below to be raised and argued for the first time at the appellate stage. In the Privy Council case of *United Marketing Co v. Hasham Kara* [1963] MLJ 261, it is stated that a point not taken in the lower court will not be allowed to be argued unless the court is satisfied that the evidence on which it is asked to decide establishes beyond doubt that the facts, if fully investigated, would support the new plea. In *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 MLJ 233, the Privy Council has also held that even if the facts are beyond dispute the court would not readily allow a fresh point of law to be argued without the benefit of the judgment of the judges in the court below (both the above cited cases were followed by the Federal Court in the case of *S Mariappan v. Government of Malaysia* [1983] 2 MLJ 340).
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> [16] In order to justify the new point to be raised on appeal, it must be shown that the new point comes within the established exceptions, ie jurisdiction, illegality or where, if the evidence on which the appellate court is asked to decide, if investigated, would fully support the new plea (see *Muniandy & Anor v. Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416).
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> [17] In the present case, *the new point relating to the extraneous issue (touching on the issue of unsatisfactory leave records of and leave applications by the appellant) was not raised by the appellant during the trial before the High Court. The appellant did not lead any evidence on the issues nor were they put to the witnesses of BNM that the extraneous issues* were actually considered by the disciplinary committee. It is trite law that the failure to put one's case to his opponent's material witnesses would preclude the former from raising it in his argument (see *Browne v. Dunn* (1893) 6 R 67; and accepted by the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal* [1995] 2 MLJ 770). The ground for the appellant's application does not fall within any one of the established exceptions accepted by the courts. To allow such an application would result in allowing a new line of defence or plea without hearing fresh evidence.
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> [18] The new point sought to be raised on appeal by the appellant would be prejudicial to BNM as the respondent, as its witnesses were not afforded an opportunity to respond or defend the appellant's allegation that the extraneous issues were considered by the disciplinary committee (see the Federal Court decision in *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 3 MLJ 517). (emphasis added)

[65] In the context of the appellant's argument that the issue here goes to jurisdiction, it's also instructive to refer to *S Mariappan v. The Government Of Malaysia* [1983] 2 CLJ 124; [1983] CLJ (Rep) 382; [1983] 2 MLJ 340 FC per Abdul Hamid Omar FJ (as he then was) where he said (pp. 341-342):

> The principles on which the Court of Appeal will permit a point of law not raised in the Court below to be raised on appeal can be found in a number of authorities. As a starting point we refer to a passage in *Mallal's Supreme Court Practice* at page 917 under the heading "Points not taken in Court below." The principle that emerges from the authorities, fundamentally, is that the Court of Appeal will not consider an issue which has not been raised before, particularly on a point not argued in the court below and which did not appear specifically in the pleadings. The propriety of allowing such point to be raised is also doubted where it is highly technical and devoid of merit. Cases decided after 1962 confirm that a ground of appeal not pleaded in the lower court is not open to the appellant (*Innaya v. Lombard Acceptance (M) Ltd* [1963] MLJ 30). In the Privy Council case of *United Marketing Co v. Hasham Kara* [1963] MLJ 261 it is stated that a point not taken in the lower court will not be allowed to be argued unless it is satisfied that the evidence on which it is asked to decide establishes beyond doubt that the facts, if fully investigated, would support the new plea. It is also stated that even if the facts are beyond dispute they would not readily allow a fresh point of law to be argued without the benefit of the judgment of the Judges in the court below. (See also *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 MLJ 233 PC).
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> A further authority on the principle followed by an appellate court in dealing with a point not taken at the trial may be found in *Tan Tek Yan v. Samuel* [1964] MLJ 283 FC where it is held that *a point, not taken at the trial, and presented for the first time in the appellate court ought to be most jealously scrutinised and an appellate court ought only to decide in favour of the appellant on a ground there put forward for the first time, if it be satisfied beyond any doubt, first, that it had before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial.* (See also *Lim Chui Lai v. Zeno Limited* [1964] MLJ 314 FC). (See also *The "Tasmania"* (1890) 15 AC 223). In *Gulwant Singh v. Abdul Khalik* [1965] 2 MLJ 55 PC Thomson LP delivering the judgment of the court referred to *The "Tasmania"* and went on to say that
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> The question of whether effect should be given to a point not raised at the trial and which is raised for the first time in the appellate Court is one for discretion and the principles on which that discretion will be exercised have been set out by Lord Watson in his judgment in *Connecticut Fire Insurance v. Kavanagh* [1892] AC 473, 480 as follows:
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> When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that

A course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide established beyond
B doubt that the facts, if fully investigated, would have supported the new plea.

In another case *Ang Hua Bee v. Leong Miaw Yu* [1969] 1 MLJ 192, also on a similar point, it was laid down that although as a general rule a point not raised in the court below cannot be considered on appeal but *in cases*
C *relating to jurisdiction of the court to order possession, the fact that the point was not taken in the court below does not preclude the tenant from relying on it.*

In the present case the facts are not in dispute. The point raised cannot be said to be merely technical but is related to jurisdiction to be determined by reference to certain provisions of the Constitution and
D Service Regulations. There is no question of fact that calls for determination. On the evidence disclosed the appellant's contention rests solely on whether the proper body vested by law to exercise disciplinary authority over the appellant was the Public Services Disciplinary Board or the Public Services Commission. The question is, therefore, essentially one of jurisdiction. If we should hold in favour of the appellant, it would
E necessarily mean the Public Service Commission had acted *ultra vires* and the validity and effect of the dismissal would accordingly be open to question. We therefore feel that in exercise of our discretion, indeed we consider it expedient in the interests of justice that this point, although not taken in the court below and not pleaded, should be allowed to be argued in this court. (emphasis added)

F **[66]** In the present case, the judge made findings on all the issues that were framed for trial. However, the appellant maintains that despite not having raised *locus standi* as an issue before the High Court they are entitled to raise it as a question of law before the Court of Appeal. He also maintained that the burden is on the respondents to prove special circumstances.

G **[67]** We disagree. First, the issue of *locus standi* was neither pleaded nor canvassed before the High Court. The respondents were prejudiced in that they did not have the opportunity to lead evidence on this issue or to show the relevant special circumstances.

H **[68]** Next, looking at the circumstances as a whole and *a fortiori*, in view of the finding by the judge this was a fraudulent land transfer of estate property, we are impelled to the conclusion that this of itself presents special circumstances warranting prompt action by beneficiaries to protect the estate from falling into hands of other parties and thereby leaving the estate with
I no remedy to impugn the fraudulent transfer.

[69] It is important for us to emphasise that the Federal Court in *Al Rashidy*'s case observed that all the circumstances must be examined in arriving at a just result as can be seen in the following paragraph of the report:

> [18] We agree with the view expressed by the Singapore Court of Appeal in that the special circumstances should not be confined solely to cases where the personal representative had defaulted in recovering the property of the estate. We are of the view that all the circumstances of the case ought to be considered by the court in arriving at a just result. Secondly, following *Re Atkinson* and *Omar Ali bin Mohd*, we think the *beneficiary has at least an equity in the estate of the deceased to entitle the beneficiary to seek on behalf of the estate the remedy of a declaratory judgment.*
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> [19] In the present case *the action was commenced by the beneficiaries of the estate in order to regain the said land from the respondent whom they alleged had by fraudulent means transferred the land to himself.* The respondent had also entered upon the land and damaged the fruit trees and demolished buildings found on the said land. Further, the said land is liable to be sold by the respondent to a third party. In that event the said land may be lost forever. This becomes more urgent in view of the decision of this court in *Adorna Properties Sdn. Bhd v. Boonsom Boonyamit @ Sun Yok Eng* [2001] 1 MLJ 241, which confers immediate indefeasible title to a purchaser in good faith for valuable consideration.
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> [20] Thus, the appellants have had to act fast in order to protect and preserve the estate of the deceased. Therefore, on the facts of this case, we find, there exist special circumstances for the beneficiaries to commence legal action against the respondent *qua* beneficiaries for the purpose of protecting and preserving the asset of the estate. Quite apart from that we also hold that the beneficiaries in the present case have at least an equity in the estate of the deceased to entitle them to seek a declaratory judgment. Thus, on the above grounds are (*sic*) agree with the learned counsel for the appellants that the appellants in this case had the *locus standi* to commence this action at least for the limited purpose of protecting and preserving the asset of the estate.
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> [21] In the present case the High Court found that the title to the said land was obtained by the respondent through fraud and declared that the transfer of the said land to the respondent was null and void. The court ordered the respondent to transfer or cause to be transferred the said land to the appellants. The Court of Appeal agreed with the finding of the High Court that the respondent had obtained the title to the said land through fraudulent means but because of lack of *locus standi* ordered the said land to be re-transferred to the respondent, but in the meantime ordered that a registrar's caveat be lodged against the said land pending disposal of the suit to be filed by the appellants.

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> [22] Now, in view of our finding that the appellants do have the *locus standi* to commence legal proceeding to protect and preserve the asset of the estate we hold that the appellants are entitled to the order as prayed for in prayer (c) of the claim. But as beneficiaries, we hold that the appellants are not entitled to claim for general and special damages on behalf of the estate; such a claim can only be made by the legal representative of the estate.

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[70] In this case, the respondents had pleaded (para. 3 of the SOC) that they are the grandchildren and lawful beneficiaries of Oomar. That would entitle them to an equity in the estate of Oomar. Thus, we have no doubt that in this case the absence of LA should not be an obstruction to the beneficiaries

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of the estate of Oomar to take legal steps to protect the subject land which has been proven (and which the appellant accepts) to have been fraudulently transferred to the appellant.

[71] Lastly, in so far as jurisdiction is concerned, we are of the view that it is not tenable to conflate *locus standi* with jurisdiction. These are different

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concepts. Counsel's reliance on the Court of Appeal's case of *Lee Ngan Fong & Ors v. Gan Bo Tan & Ors* (*supra*) is misplaced.

[72] In that case, the Court of Appeal observed that the appellants were siblings of the deceased and had no claim as dependents of the deceased. Thus

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in law, they stood to gain nothing from the intestacy of the estate of the deceased.

[73] On that narrow premise the Court of Appeal ruled that the appellants in that case had no legal standing. The lack of legal capacity is quite different from jurisdiction. Thus, we are not convinced that there is an issue of

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jurisdiction which arises here such that it can be raised as a fresh point on appeal without the need for evidence.

[74] Indeed, we are of the view that had the issue been properly raised before the judge, appropriate evidence of special circumstances may have been adduced.

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[75] At any rate, we are of the view that even with the limited factual matrix that was presented and coupled with the finding of the judge as regards the fraudulent transfer of the subject land, special circumstances exist to warrant the filing of the action to regain ownership of the subject land.

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[76] In the upshot, we see no merits and no appealable error in the findings of the High Court Judge to warrant any appellate intervention by this court.

The Outcome

[77] The appeal is dismissed with costs of RM5,000 (subject to allocator).

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